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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1074

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, MOE FISHMAN, JAMES YATES and MAURY COLLOW,

Petitioners,

v.

ATTORNEY GENERAL OF THE UNITED STATES and THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners pray that a writ of certiorari issue to bring to this Court a case pending in the United States Court of Appeals for the District of Columbia Circuit wherein the petitioners have on appeal a judgment of the United States District Court for the District of Columbia granting summary judgment for the respondents.

OPINION BELOW

No opinion was filed by the District Court. The opinion of the Court of Appeals in a related case, *Industrial Workers of the World v. Clark*, No. 20,586 decided September 26, 1967, is appended hereto as Appendix A. It has not as yet been reported.

JURISDICTION

The judgment of the United States District Court for the District of Columbia was entered on November 14, 1967. A notice of appeal was filed by petitioners on November 24, 1967, and the case was docketed in the United States Court of Appeals for the District of Columbia Circuit on January 3, 1968. The jurisdiction of this Court is invoked under 28 U. S. Code, sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of Executive Orders 9835 and 10450 authorizing the Attorney General to designate organizations as totalitarian, fascist, communist, subversive, etc. are unconstitutional on their face.

2. Whether the Attorney General's designations of organizations pursuant to said Executive Orders violate the First, Fifth, Ninth and Tenth Amendments of the Constitution and constitute bills of attainder.

3. Whether an organization which the Attorney General has designated as "subversive" or its members may challenge the constitutional power of the Attorney General to list organizations without first exhausting the administrative procedures set up by the Attorney General.

4. Whether the procedural regulations of the Attorney General for designating organizations are unconstitutional on their face or as applied to petitioner.

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent provisions of Executive Orders 9835 and 10450 and of the Attorney General's Rules of Procedure are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

On or about March 21, 1947, the Attorney General of the United States issued, pursuant to Executive Order 9835, a list of organizations separately characterized as "totalitarian, fascist, Communist or subversive." Among the organizations listed as "Communist" were the petitioner, the Veterans of the Abraham Lincoln Brigade (hereafter called the Veterans), and the Abraham Lincoln Brigade (hereafter called the Brigade). The designations were made without notice or hearing, and no provision existed for seeking administrative relief.

The Veterans is an unincorporated association whose membership consists of those members of the Brigade who returned to the United States from Spain after fighting from 1936 to 1938 in the armed forces of the Republic of Spain in support of the constitutionally elected government against insurgent, fascist forces. The individual petitioners all served in the Spanish Civil War as members of the Brigade and are members of the Veterans. The purpose and activities of the Veterans were to foster and continue the friendships formed in Spain during this period, to provide rehabilitation and medical care for members of the Brigade, to assist members of the Brigade in obtaining employment, food and living facilities upon their return to the United States, and to publish a periodical devoted to the activities of members of the Brigade.

On April 22, 1953, the Attorney General petitioned the Subversive Activities Control Board for an order requiring the Veterans to register as a "Communist-front organization" under section 7 of the Subversive Activities Control Act, 50 U. S. Code, §§ 781 *et seq.*

A few days later, on or about April 27, 1953, the Attorney General reissued his list of disapproved organizations, but without separate characterizations, under Executive Order 10450, which superseded Executive Order 9835. The Brigade and the Veterans were continued on the list.

The relisting was also unaccompanied by notice or hearing. However, at the time of the redesignation, the Attorney General issued regulations providing procedures for contesting the listing. Under these regulations, an organization whose listing was carried over from the previous designation was allowed ten days from the effective date of Executive Order 10450 to file with the Attorney General a written notice that it contested the listing. See 28 C.F.R. § 41.1(a). Failure to file such a notice of contest was declared by the regulations to be "an acquiescence in such designation."

The Brigade was not then in existence, having expired in 1938. The Veterans did not file a "notice of contest" within the ten day period, but contested the proceedings instituted against it by the Attorney General before the Subversive Activities Control Board.

The Board issued a registration order, but after court review and a remand of the case (see *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*, 380 U.S. 513), the registration order was vacated and the Attorney General's petition dismissed by the Board on April 20, 1966, on joint motion of the Veterans and the Attorney General.

On May 31, 1966, counsel for the Veterans requested the Attorney General to remove the names of the Veterans ~~and the Brigade~~ from the list of "subversive organizations." On July 6, 1966, the Attorney General denied this request.

Petitioners thereupon filed in the United States District Court for the District of Columbia a complaint for a declaratory judgment and an injunction, seeking removal of the Veterans ~~and the Brigade~~ from the Attorney General's list. The theory of the complaint was that the listing violated the First, Fifth, Ninth and Tenth Amendments and the prohibition of bills of attainder. The complaint alleged that the

listing was injuring the reputation, business and prestige of the Veterans and its ability to obtain and retain members and to fulfill its purposes. It was also alleged that the list was used by the respondent Civil Service Commission, the Department of Defense, the Coast Guard, other federal agencies, State and local governments, and private concerns and individuals, as a basis for denying members of the Veterans and the Brigade various rights and benefits, such as employment, trade union membership, ability to rent halls and meeting places, etc.

The parties filed cross-motions for summary judgment, and the court granted the respondents' motion for summary judgment and denied petitioners'. In so doing the court relied upon the decision of the United States Court of Appeals for the District of Columbia Circuit, *Industrial Workers of the World v. Ramsey Clark*, No. 20568, decided September 26, 1967.[2] The Court of Appeals held in that case that an organization on the Attorney General's list could not attack the constitutionality of the listing because it had failed to file a notice of contest under the Attorney General's rules and because it was barred by laches.

REASONS FOR GRANTING THE WRIT

1. The importance and substantial nature of the constitutional questions posed by the present case need no elaboration, since they were recognized by the various opinions in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123. That decision did not reach, but cast a serious cloud on, the power of the Attorney General to list organizations as "subversive." The opinions of Justices Black and Douglas concluded that the Attorney General's list violated the First Amendment and was a bill of attainder (at 143, 177). This view was reiterated by Justices Black and Douglas in *Barsky v. Board of Regents*, 347 U.S. 442, 459.

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[2] A petition for a writ of certiorari in this case has been filed and is pending in this Court, No. 953, 1967 Term.

In his posthumously published book, *The Supreme Court in the American System of Government*, Mr. Justice Jackson stated (at p. 25): "In 1951 the Court cast serious doubts upon the legality of the Attorney General's list of subversive organizations promulgated in 1947. But the list had long been widely circulated and accepted, and despite the Court's views it has never ceased to be used in the press, in the executive department, by and before congressional committees, and even in courts to prejudice individuals in their liberty, position and good name."

Prof. Chafee has stated (*The Blessings of Liberty*, p. 27): "The list . . . has been widely employed by states and cities and even by private organizations as proof of the disloyalty of teachers and employees. The radio industry has accepted it as a basis for canceling the contracts of its performers. The list has accordingly become a powerful weapon for injuring any group there named or any individual who belongs to such a group."

These observations are confirmed by events discussed in such recent cases as *Gilmore v. James*, 274 F. Supp. 75, aff'd sub nom. *James v. Gilmore*, __ U.S. __, No. 850, Oct. T. 1967, decided Jan. 15, 1968, 36 U.S.L.W. 3285 (applicants for University employment required to sign statements of non-membership in organizations on Attorney General's list); *United Steelworkers of America v. Bagwell*, 383 F.2d 492 (permit to distribute leaflets barred to members in listed organizations); *Schneider v. Roland*, 263 F. Supp. 496, rev'd sub nom. *Schneider v. Smith*, __ U.S. __, No. 196, Oct. T. 1967, decided Jan. 16, 1968, 36 U.S.L.W. 4131 (list used in Coast Guard screening of applicant for merchant marine employment). And see Note, *The Bill of Attainder Clause and Legislative and Administrative Suppression of "Subversives,"* 67 Col. L. Rev. 1490, 1506-1508.

Thus notwithstanding its constitutional dubiety, the Attorney General's list continues to be used on a wide scale to defame organizations and to discourage exercise of the right of association.

2. Efforts to challenge the validity of the Attorney General's list have been frustrated by perplexing procedural obstacles erected by the United States Court of Appeals for the District of Columbia Circuit and applied to petitioners in this case by the District Court, and by evasive actions of the Attorney General.

The Court of Appeals has barred listed organizations from challenging constitutional power of the Attorney General on the grounds of failure to exhaust administrative remedies. See *National Council v. Brownell*, 243 F.2d 222; *Association of Lithuanian Workers v. Brownell*, 247 F.2d 64, vacated as moot, 355 U.S. 23; *National Lawyers Guild v. Brownell*, 225 F.2d 552; *Industrial Workers of the World v. Clark, supra*. In the last cited case, the Court also applied a remarkable doctrine of laches, finding that the Attorney General would be prejudiced (concededly a necessary element in applying laches) if the I.W.W. obtained a decision that the list was unconstitutional, because other listed organizations might then also sue to have the list declared unconstitutional.

As to the court's exhaustion doctrine, that might be applicable to bar a litigant from litigating in court evidentiary objections not raised in an available administrative proceeding. It passes understanding how failure to exhaust an administrative evidentiary procedure can bar a challenge to constitutional power. See *Cole v. Young*, 351 U.S. 536, held that exhaustion of an administrative remedy was not a prerequisite to a judicial challenge to the government agency's power.[3] The Court of Appeals for the District of Columbia Circuit had adopted the same position in *Cole*, stating, 226 F.2d 337 at 339: "It [the government] says Cole failed to exhaust his administrative remedy and so his action must fall. While Cole failed to pursue the administrative remedy offered him – he affirmatively rejected it – nevertheless the administrative process was exhausted and a final administrative de-

[3]For another application of this rule see *Wills* v. *United States*, 384 F.2d 943.

cision was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken."[4]

Moreover, the Court of Appeals recognized in the *I.W.W.* case, *supra*, that since the *Joint Anti-Fascist* case, *supra*, there has been considerable development in the law as to the permissibility of government screening of employees and the visiting of other consequences on individuals because of their political associations and views. See ftn. 9 of that opinion, Appendix A p. 11 herein. Nevertheless, the court refused to consider the validity of the list in light of the new learning.

The Attorney General has warded off challenges to his constitutional power by several acts of discretion. He abandoned his proposal to list the National Lawyers Guild, when its determination to litigate the matter to a conclusion became obvious. See the account in *Dombrowski v. Pfister*, 380 U.S. 479, 495, ftn. 12. He suddenly delisted *ex parte* two organizations, without any prior indication or administrative proceeding, after they filed a petition for certiorari in this Court challenging their listing, thus mooting the case. See *Association of Lithuanian Workers v. Brownell*, 355 U.S. 23. Since that time he has added no more organizations to the list, although it is apparent that there are now extant many new groups which are "subversive" by the standards reflected in the list. It is not an unfair inference that his forbearance has been at least in part due to his recognition that his authority to list is constitutionally dubious.

As matters now stand, unless the Court reviews the validity of the list in a case brought by an organization, such as petitioner here, which has been listed since 1947, the list will remain immune from judicial review, although it will

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[4]The Court of Appeals did not elucidate, either in the *National Council* case or the *I.W.W.* case why the *Cole* principle was not applicable to a challenge to the validity of the Attorney General's list.

continue to serve as an oppressive weight on the freedom of association.

3. The Court of Appeals has in its prior decisions already ruled adversely to petitioners on the questions they raise. Petitioners should not be required to seek the preordained decision of that court. The petition of the I.WW. is now pending in this Court. This case will bring before the Court a different approach to the constitutional questions and additional facts which will be enlightening in decision of those questions.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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